UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT



JAMES TINNEY,

Appellant,

vs.

LAWRENCE E. WILSON, Warden, et al.,

Appellee.

No. 22266

APPELLEE'S BRIEF



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JURISDICTION

The jurisdiction of the United States District Court, Northern District of California, to entertain appellant's application for a writ of habeas corpus was conferred by section 2241 of Title 28, United States Code. The jurisdiction of this Court is conferred by section 2253 of Title 28, United States Code, which makes an order in a habeas corpus proceeding reviewable when, as here, a certificate of probable cause has issued.

## STATEMENT OF THE CASE

This is an appeal from the order of the United States District Court, Northern District of California, denying appellant's petition for a writ of habeas corpus.

A. Proceedings in the State Courts.

On July 30, 1963, appellant was convicted of a violation of section 11530 of the California Health and Safety Code (possession of marijuana). He was sentenced to be imprisoned in the state prison for the term prescribed by law (CT 40). The conviction was appealed to the California Court of Appeal, Second Appellate District. That court affirmed on July 12, 1966 (RT 39a-391). A petition for a writ of habeas corpus challenging this conviction was denied by the California Supreme Court (RT 6-7).

B. Proceedings in the Federal Courts.

Two previous applications for the writ of habeas corpus have been filed in the United States District Court, Northern District of California, in actions number 46079 and 46763. Both were denied. The petition which resulted in this appeal was filed

on June 29, 1967 (RT 1). An order to show cause directed to appellee issued June 28, 1967 (RT 30), and a continuance was granted on July 14, 1967 (RT 31). On July 21, 1967, appellee filed a return to the order to show cause (RT 32) and appellant's traverse was filed on August 3, 1967 (RT 71). The District Court's order denying the writ of habeas corpus was entered September 18, 1967. At the same time, the court certified that probable cause to appeal existed (RT 88-89).

## STATEMENT OF FACTS

The facts in this case are undisputed. They are related in the Clerk's and Reporter's transcripts of the proceedings in the California Superior Court which were lodged with the District Court and which are exhibits before this Court. The pertinent facts are detailed in the opinion of the California Court of Appeal attached to the return to the order to show cause (CT 39a-391). These recitals have not been challenged by petitioner and thus are conclusive of any factual issues. 28 U.S.C. § 2254(d).

The prosecution evidence was presented at the preliminary hearing. Appellant testified in his own

behalf at the trial. At the preliminary hearing counsel for appellant stipulated that if W. King had been called, he would be qualified as an expert forensic chemist, and would have testified that the cigarette contained in People's Exhibit No. 1 contained marihuana. (Cl. Tr. pp. 4-5).

David McGill testified that he was a police officer for the City of Los Angeles, attached to the Wilshire Vice Detail. (Cl. Tr. p. 5). On April 17, 1965, at about 11:30 p.m. while driving down Washington Boulevard in the City of Los Angeles, he encountered a young female Negro, who called to him, "Do you want a date?" She indicated he should drive further westbound and park the car. The officer testified that he drove to 5204 West Washington where he let his partner out of the car and returned to meet the girl. The officer and the girl discussed an act of prostitution. They then drove in his car to a hotel at approximately 5126 West Washington Boulevard. The officer declined to enter the hotel. A second young Negro female approached the car and the two girls discussed the matter. It was agreed that the first girl would engage in an act of prostitution in the car, with the stipulation that the second girl would follow in her car as a lookout.

(Cl. Tr. pp.6-7).

The second girl left and returned shortly thereafter in a 1956 Pontiac, whereupon the two cars proceeded westbound on Washington Boulevard to the location where the second officer was waiting. Upon arriving at the location the two girls were arrested for prostitution. (Cl. Tr. p. 8).

The officer testified that he and his partner then observed appellant lying on the back seat of the Pontiac. He was ordered out of the car. (Cl. Tr. p. 8). The officer stated he thought appellant was in a position to rob him had he driven to the alley where he had agreed to go with the girls. (Cl. Tr. p. 9).

The officer conducted a cursory search of appellant to determine if he was armed. During the search he discovered an object in appellant's left pants pocket that felt like a cellophane package containing a pill or capsule. He asked appellant what it was and appellant stated, "Nerve pills." (Cl. Tr. p. 9). Appellant was thereupon advised of his constitutional rights to counsel and his right to remain silent. (Cl. Tr. p. 12). Appellant then stated he had no prescription for these pills. The officer removed the package from appellant's pocket and found

numerous pink pills that appeared to be Seconal. (Cl. Tr. pp. 12-13). Objection to this testimony by counsel for appellant was overruled by the court. (Cl. Tr. pp. 14-16).

Appellant was then placed under arrest for possession of dangerous drugs and handcuffs placed on him. A second search of appellant's person was conducted, and the officer found a paper wrapped cigarette, which was marked as People's Exhibit No. 1 by the court. Appellant stated to the officer that the cigarette was marihuana. He admitted having it in his pocket and stated he had obtained it from a friend for 50 cents. (Cl. Tr. pp. 16-18).

Appellant testified in his own behalf and stated he had been asleep in the car at the time the officers found him. (Rep. Tr. p. 6). He further stated he had no knowledge of the activity that the girls were engaged in and that he did not know the second girl. (Rep. Tr. p. 7). Appellant testified he was taken from the car, handcuffed and searched twice, and that he had no knowledge as to how the marihuana cigarette got into his pocket. (Rep. Tr. pp. 7-8). He further denied making any statements to the police. (Rep. Tr. p. 10).

## SUMMARY OF APPELLEE'S ARGUMENT

I. The evidence and statements received against petitioner were not the product of an unlawful search and seizure.

II. The Miranda principles do not apply to petitioner's case.

III. Petitioner was not deprived of any constitutional rights by the tactic adopted by his trial counsel of submitting the case on the transcript of the preliminary examination.

## ARGUMENT

### I

### THE EVIDENCE AND STATEMENTS RECEIVED AGAINST PETITIONER WERE NOT THE PRODUCT OF AN UNLAWFUL SEARCH AND SEIZURE.

Little can be added to the incisive and persuasive analysis of this issue found in the opinion of the California Court of Appeal. The pertinent state authorities are collected therein. Also, we are satisfied that little can be added to the argument contained in the Points and Authorities submitted to the District Court on this issue. Accordingly, we incorporate by reference the opinion of the Court of Appeal and the

text following the argument heading I in the Points and Authorities as our brief herein (CT 35-37; 39a-391). In addition, however, we add the following paragraphs treating further pertinent authorities.

We have taken the position that the seizure of the evidence from petitioner is justified on each of two separate grounds: (1) there was probable cause to arrest him for complicity in the prostitution offenses, and (2) there was sufficient suspicion to justify his momentary detention for investigation and, further, the circumstances justified the officers in conducting the "pat search" or "frisk" for their own safety which resulted in the discovery of the Seconal pills and the marijuana cigarette. Further comment on the second ground is in order.

As noted in appellee's return (CT 36), the United States Supreme Court has granted certiorari in three cases involving the "stop and frisk" issue (CT 36). It is noteworthy that pending a definitive ruling by the high court in these cases, the highest courts of New York and New Jersey have recently confirmed the "stop and frisk" doctrine. In State v. Dilley, 231 A.2d 353 (N.J. 1967), the Supreme Court of New Jersey in an instructive opinion which collects the pertinent decisions

confirmed that in its view both the temporary-detention-for-investigation doctrine and the superficial search or "frisk" doctrine were constitutionally permissible under the Fourth Amendment.

The Court of Appeals of New York has gone even further under that state's statutory "stop and frisk" law. Thus, New York's "frisk" law allowed only the patting of the exterior of a suspect's clothing. Nevertheless, the court held that where the arresting officer received information from an anonymous informer that a person matching the description of the defendant was carrying a pistol in his left hand jacket pocket, he was not required to make a preparatory frisk but was justified in making an immediate search for the weapon. This action was justified on the ground that to require a "pat" search would gravely jeopardize the officer's personal safety as well as that of the public. People v. Taggart, 20 N.Y.2d 335, 229 N.E.2d 581, 283 N.Y.Supp.2d 1 (1967).

It is plain that the essential prerequisite for a "frisk" search is the existence of circumstances indicating the need for the officer to take steps for his own personal safety or that of others in the immediate vicinity. Manifestly, such circumstances

existed in this case. As noted, the arresting officer testified that he believed petitioner was hidden in the prostitute's car for the purpose of committing robbery (CT 39d).

In an analogous situation, this Court and others have concluded that the safety of officers will justify steps which would not otherwise be warranted. This Court approved the forcible entry by F.B.I. agents into an apartment without first announcing their authority and purpose as required by statute where to do so would have created a substantial peril to the officers. Gilbert v. United States, 366 F.2d 923, 931-32 (9th Cir. 1966). The rationale is equally applicable to this case.

Appellee respectfully submits that there is no constitutional infirmity in petitioner's arrest and that the evidence seized and statements obtained were properly admitted in evidence.

## II

## THE MIRANDA PRINCIPLES DO NOT APPLY TO PETITIONER'S CASE.

During the "pat" search of appellant after he was asked to step out of the car, the officer felt an object in his left pants pocket which he believed to be pills or capsules. He asked petitioner what this

object was and petitioner replied, "Nerve pills." The officer then immediately advised him that he had a right to an attorney, that he did not have to say anything, and that anything he did say could be used in the future against him (RT 39e). Following this admonition, petitioner made incriminating statements. He contends that the admonition was insufficient and that the statements were improperly received in evidence against him.

Petitioner is not in a position to invoke the rules announced in Miranda v. Arizona, 384 U.S. 436 (1966). Petitioner's trial concluded and judgment was entered on July 30, 1965 (RT 40). The Miranda decision was announced on June 13, 1966. In Johnson v. New Jersey, 384 U.S. 719 (1966), the Supreme Court declared that the rules of Miranda were to have prospective application only. Accordingly, those rules have no application to appellant's case. See also, Frias v. Wilson, 373 F.2d 61 (9th Cir. 1967); Smith v. Wilson, 373 F.2d 504 (9th Cir. 1967).

III

PETITIONER WAS NOT DEPRIVED OF ANY CONSTITUTIONAL RIGHTS BY THE TACTIC ADOPTED BY HIS TRIAL COUNSEL OF SUBMITTING THE CASE ON THE TRANSCRIPT OF THE PRELIMINARY EXAMINATION.

In his petition, appellant alleged that his

trial counsel was incompetent because he advised him to submit the case to the superior court on the transcripts of the preliminary hearing. He asserts that "it is obvious that both of his counsel's [sic] appointed by the court were incompetent and of no help, other than to be the one to deliver up to the Judge, the Lamb, for the Sacrifice, . . . ." (RT 23). The record refutes this contention.

The reporter's transcript indicates that appellant was thoroughly interrogated by the district attorney concerning his understanding of the waiver of his right to a jury trial. Thereafter, defense counsel stipulated that the prosecution's case could go in on the transcript of the preliminary hearing subject to any objections. After the court read the transcript, the prosecution rested. Defense counsel then vigorously objected to the introduction of the physical evidence on the ground that the "pat down" search or "frisk" was unlawful. After the objection was overruled, appellant took the stand and testified in his own behalf concerning the circumstances of the arrest and search (CT 39g-39h). At no time during the entire proceeding did appellant assert or even hint of any objection to the procedure followed.

Relying on Brookhart v. Janis, 384 U.S. 1 (1966), appellant asserts that the procedure adopted by his counsel was tantamount to the entry of a plea of guilty by the attorney. In Brookhart, the court characterized the proceeding described as a "prima facie trial" as "the equivalent of a guilty plea." Id. at 7. The court summarized its holding as follows, "Our question therefore narrows down to whether counsel has power to enter a plea which is inconsistent with his client's express desire and thereby waive his client's constitutional right to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him. We hold that the constitutional rights of a defendant cannot be waived by his counsel under such circumstances." Ibid. (Emphasis added). On its facts, Brookhart is plainly distinguishable from the present case. Here there is no indication at trial that appellant disagreed with the course proposed and taken by his counsel.

It is common knowledge that where an attorney believes he has an arguable case of an unlawful search and seizure he may prefer to have that question decided on the usually sketchy evidence adduced at a preliminary hearing rather than allow the prosecution to buttress its case at a full trial. Many other considerations may

also be behind such a decision. See CEB, California Criminal Law Practice, § 8.75 (1964). Here, counsel vigorously pursued his objection to the introduction of the marijuana cigarette and placed appellant on the stand to testify to his version of the arrest and search. This was unquestionably a tactical decision which it was within the competence of the attorney to make.

In this Circuit, it is settled that an attorney can waive the right to confront and cross-examine witnesses on behalf of a client where it is done as a legitimate strategy of defense. And manifestly, such a decision does not establish that the attorney was incompetent. See Wilson v. Gray, 245 F.2d 282 (9th Cir. 1965); Silva v. Klinger, 355 F.2d 657, 658 (9th Cir. 1966); Butler v. Wilson, 365 F.2d 308, 310 (9th Cir. 1966). Indeed, this Court has specifically held that the Brookhart principle does not apply under circumstances such as appear in this case. Symons v. Klinger, 372 F.2d 47, 49-50 (9th Cir. 1967).

Appellee therefore submits that the District Court properly rejected appellant's claim that he was denied constitutional rights by the procedure of submitting the case on the transcript of the preliminary hearing.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court denying appellant's petition for a writ of habeas corpus should be affirmed.

DATED: December 18, 1967

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## CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: San Francisco, California

December 18, 1967

MICHAEL J. PHELAN
Deputy Attorney General
of the State of California